

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 08 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

DOUGLAS L. CECRLE,

Petitioner - Appellant,

v.

C.A. TERHUNE, Director,

Respondent - Appellee.

No. 04-16822

D.C. No. CV-99-00180-WBS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, Chief Judge, Presiding

Submitted December 5, 2005**
San Francisco, California

Before: **KOZINSKI** and **McKEOWN**, Circuit Judges, and **HOGAN**,
District Judge.***

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Michael R. Hogan, United States District Judge for the District of Oregon, sitting by designation.

1. We may set aside the conviction under Strickland v. Washington, 466 U.S. 668 (1984), only where counsel’s performance falls below an objective standard of reasonableness and the defendant is prejudiced by the deficient performance. See id. at 688, 694. Because the jury was instructed that it could consider voluntary intoxication in assessing petitioner’s mental state, “competent counsel could reasonably conclude that the instructions adequately advised the jury to consider the evidence of intoxication on the question of premeditation, and that an additional instruction stating the obvious—that premeditation is a mental state—was unnecessary.” People v. Castillo, 945 P.2d 1197, 1201 (Cal. 1997).

2. Although it is doubtful whether petitioner exhausted his claim that there was “an actual breakdown of the adversarial process during the trial,” United States v. Cronic, 466 U.S. 648, 657–58 (1984), we deny the claim on the merits, see 28 U.S.C. § 2254(b)(2). Petitioner’s trial counsel raised multiple defenses, including voluntary intoxication, involuntary intoxication and heat-of-passion. Petitioner provides no persuasive evidence for his claim that “counsel entirely fail[ed] to subject the prosecution’s case to meaningful adversarial testing.” Cronic, 466 U.S. at 659.

AFFIRMED.